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February 3, 1999

BY HAND DELIVERY

Ms. Magalie R. Salas, Secretary
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1919 M Street, N.W.
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re:


In the Matter of Amendment of Section 73.202(b) Table of Allotments FM Broadcast Stations (Cross Plains, et. al.) MM Docket No. 98-198; RM-9304
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Dear Ms. Salas:

Transmitted herewith on behalf of Wagonwheel Broadcasting of Santa Anna are an original and four (4) copies of its "Opposition to Joint Motion to Strike Reply Comments" as directed to the Allocations Branch.

Should any additional information be required, please contact this office.

Very truly yours,


Henry E. Crawford
Counsel for
Wagonwheel Broadcasting of
Santa Anna

cc: the Allocations Branch

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Cross Plains, Texas et al.)

MM Docket No. 98-198

RM-9304

To: The Allocations Branch
Policy and Rules Division
Mass Media Bureau

OPPOSITION TO JOINT MOTION TO STRIKE REPLY COMMENTS

Wagonwheel Broadcasting of Santa Anna ("Wagonwheel"), by counsel, in accordance with 47 CFR §1.45(a), hereby opposes the *Joint Motion to Strike Reply Comments* ("Joint Motion") filed in the above-referenced proceeding by First Broadcasting Management, L.L.C. ("FBM"), WBAP/KSCS Operating, Ltd. ("WBAP"), Blue Bonnet Radio, Inc. ("Blue Bonnet") and Hunt Broadcasting Inc. (collectively referred to as the "Joint Parties") on January 20, 1999. In support thereof, the following is stated.

I. INTRODUCTION

1. The Joint Motion is little more than a wrongful attempt to add argument to this proceeding after the time for filing comments and reply comments has expired. The Joint Parties now disavow their original proposals and argue that no channel should be allocated to Cross Plains because there is no "...clear and unequivocal interest on the part of ALALATEX or any other party

for a station at Cross Plains.”¹ This assertion has no basis in the record and the Joint Parties’ untimely argument will only confuse and disrupt this already complex proceeding, all to the detriment of Wagonwheel. The Joint Parties also argue lack of service.² Neither argument raised in the Joint Motion has any merit and, consequently, the Joint Motion must be denied and the additional argument contained therein stricken from the record.

II. ARGUMENT

A. The ALALATEX Conflict

2. In its original petition, ALALATEX Broadcasters (“ALALATEX”) proposed the allotment of Channel 245C3 at Cross Plains Texas and expressed an intent to apply for the channel in the event that it was allocated.³ As part of a Counterproposal filed by FBM, ALALATEX subsequently filed a statement with the Commission seeking to substitute Channel 290C3 at Cross Plains in lieu its Channel 245C3 proposal.⁴

3. In a statement filed with the counterproposal, ALALATEX reconfirmed its expression of interest in applying for a station at Cross Plains, Texas. It stated:

I, Jean Hill, a partner in ALALATEX do hereby agree to the substitution of channel 290C3 at Cross Plains, Texas, in lieu of channel 245C3 we previously proposed. ALALATEX advises the Commission that its interest in Cross Plains will continue to exist for Channel 290C3 as it did for Channel 245C3.

¹ Joint Motion, p. 1, ¶1.

² Joint Motion, p. 2, ¶2.

³ Notice of Proposed Rule Making, MM Docket 98-198, Released October 30, 1998, p. 1, ¶1.

⁴ See, STATEMENT OF ALALATEX, Counterproposal, Exhibit 1.

STATEMENT OF ALALATEX, emphasis supplied. ALALATEX' s statement clearly and unequivocally states a continuing expression of interest coextensive with that of its original proposal.

4. ALALATEX subsequently reconfirmed its commitment to Channel 290C3. In a statement provided to FBM in its Supplement to Counterproposal, ALALATEX stated it was: "...willing to change the proposed channel allotment for Cross Plains to Channel 290C3." It additionally certified that it changed channels "...in order to obtain a new channel at Cross Plains..." (emphasis supplied). Finally, ALALATEX represented to the Commission that it had received no consideration in exchange for the channel change.

5. Wagonwheel had previously filed a Petition for Rulemaking seeking to allot channel 290C2 to the community of Santa Anna, Texas as its first aural service. In response to the conflict created in this proceeding by the change to Channel 290C3 at Cross Plains, Wagonwheel filed its reply comments.⁵ Wagonwheel supported the non-conflicting proposal of Gulfwest Broadcasting Company and Sonoma Media Corporation. It argued that allotting a new first service to the community of Santa Anna presented the superior proposal from the standpoint of the public interest.

6. Now, in the Joint Motion, for the first time the Joint Parties argue that notwithstanding the sworn statements made by ALALATEX regarding the

⁵ Reply Comments of Wagonwheel Broadcasting of Santa Anna, p. 2, ¶4.

change to Channel 290C3, ALALATEX lost its rights because it "failed" to file appropriate Comments.⁶

7. There is no logic to the argument advanced by the Joint Parties. Each of their counterproposals relies on the allotment of Channel 290C3 to Cross Plains, Texas.⁷ The statements made by ALALATEX indicate a full comment to apply for a station to be constructed on Channel 290C3. If the Commission ignores Wagonwheel's petition, as suggested by the Joint Parties, ALALATEX itself will be able to argue against Wagonwheel's proposal in any subsequent rulemaking involving Wagonwheel's proposal. It could then claim that its Cross Plains proposal on Channel 290C3 meets all the Commission's requirements. By shifting positions and changing proposals midstream, these parties could, in effect, ambush Wagonwheel's Santa Anna proposal.

8. By disavowing the allotment of Channel 290C3 at Cross Plains, the Joint Parties are also attempting to change their counterproposals long after the deadline for doing so. See 47 CFR §1.415(d). This is not the first time in this proceeding that these parties have engaged in a tardy attempt to mend their proposals. On January 20, 1999, in what is characterized as a "Statement for the Record", WBAP and Blue Bonnet sought to include an untimely statement of intent to construct a facility at Allen, Texas that was left out of Blue Bonnet's original counterproposal. Again, on January 27, 1999, FBM filed a "Motion for

⁶ Joint Motion, pp. 1-2, ¶1.

⁷ See FBM Counterproposal, p. 4, ¶3; Hunt Broadcasting Joint Counterproposal Proposal, p. 3, ¶5; WBAP/KSCS Operating, Ltd., Counterproposal, p. i.

Leave to Supplement Record” for the purpose of further fortifying its counterproposal after the time for filing comments had passed. As in the instant case, by using these tactics, the Joint Parties are injecting substantial elements of chaos and uncertainty into this proceedings, all to the detriment of Wagonwheel, the other parties and the Commission. Therefore, given these circumstances, the Commission should dismiss the tardy attempts by the Joint Parties to shore up proposals which are plainly contrary to the public interest as filed. Wagonwheel’s Santa Anna proposal is superior to these proposals and should be recognized as such by the Commission.

9. The positions taken by ALALATEX and the Joint Parties give rise to a number of dilemmas. Only two possibilities exist in the case of ALALATEX’ s commitment to change its proposal from Channel 245C3 at Cross Plains to Channel 290C3. ALALATEX either intended to construct a station on 290C3 or it had no intention of constructing. Its commitment was either genuine or it was not genuine.

10. If its statements were not genuine, ALALATEX and the Joint Parties have misled the Commission with respect to Cross Plains, Texas. They indicated an intent to allot Channel 290C3 to Cross Plains, Texas, when, under this scenario, they had no intent to actually construct a station there at all. Moreover, ALALATEX in its statement of no-consideration did not state what, if anything, it received for abandoning its commitment to construct a facility at Cross Plains. As these dilemmas illustrate, if the ALALATEX commitment were not genuine, the

parties have engaged in what appears to have been an abuse of the Commission's processes.

11. On the other hand, if the ALALATEX commitment was, in fact, genuine, a number of equally troubling questions arise. ALALATEX appears not to have been represented by counsel in its dealings with the Joint Parties. Ethical questions arise, therefore, concerning what the Joint Parties' counsel was required to disclose to ALALATEX in order to keep it from losing its right to Channel 290C3 at Cross Plains.⁸ Is it within the bounds of appropriate ethical conduct to have taken the ALALATEX statements on a *pro se* basis knowing full well that it would later argue against ALALATEX's right to construct a station on Channel 290C3 at Cross Plains? Did the Joint Parties mislead ALALATEX into thinking that its statements agreeing to the change in channels were sufficient to actually obtain an allotment on Channel 290C3?

12. These issues demonstrate exactly why parties have been traditionally barred from presenting argument beyond the comment period. The fact is that the record demonstrates that ALALATEX did intend to construct a facility on Channel 290C3 and Wagonwheel's reply comments were appropriately filed against that proposal. Therefore, the present attempt by the Joint Parties to abandon elements of their counterproposals should not be countenanced.

B. Service on the Joint Parties

13. The Joint Parties argue that Wagonwheel failed to serve its counsel or "any of the respective proponents." Wagonwheel admits having left counsel off

⁸ See District of Columbia Rules of Professional Conduct Section IV, Rule 4.3 Dealing with Unrepresented Person.

of the service list as a matter of simple inadvertence. However, an examination of the service list shows that service was substantially made on the Joint Parties. Moreover, the Joint Parties have not shown that they were prejudiced in any respect.

14. In this proceeding, the Joint Parties have filed their various proposals jointly with other parties. In the case of FBM, its documents were filed jointly with Gain-Air, Inc. and KCYT-FM License Corp. However, a review of Wagonwheel's service list shows that counsel for KCYT-FM License Corp., Lawrence N. Cohn, did receive actual service of the document, albeit as indicated for another party. In the case of Hunt Broadcasting, Inc., again, service of this proponent was made on Mr. Cohn who is counsel for joint party, Heftel Broadcasting Corporation. Consequently, actual service was made on the joint proponents.

15. Service of the document is reflected in the Joint Parties comment that its counsel "...became aware of this filing when one of the other parties notified...counsel of the filing.⁹ Nothing in this form of service prevented the Joint Parties from immediately filing the additional argument contained in the Joint Motion. No prejudice has been claimed or demonstrated and service was made on the other parties with whom counsel had filed on a joint basis. Therefore, given the actual service on counsel for the proponents, in the absence of any claimed or demonstrated prejudice, there is no basis for striking Wagonwheel's Reply Comments in this proceeding.

⁹ Joint Motion, p. 2, ¶2.

16. Wagonwheel's rights arise solely out of its petition in the Santa Anna proceeding. It was not bound by any Commission rule to file reply comments. It did so to alert the Commission of this possible conflict and to support the sole proposal that was not in conflict with its petition. No response is normally allowed to a reply, and, as demonstrated above, counsel was actually served through its joint counsel. Thus, no prejudice is possible in these circumstances. Therefore, the Joint Parties' argument regarding service is wholly without merit.

III. CONCLUSION

17. The Joint Parties have used the guise of failure of service to launch an untimely modification of their original proposals. Whereas those proposals all rested on the allotment of Channel 290C3 at Cross Plains, Texas, the Joint Parties now contend, for the first time, that no channel should be allocated to Cross Plains, Texas because their former ally ALALATEX failed to file comments. However, this blatantly ignores ALALATEX's statements of record in which it clearly stated a continuing intention, equal to its originally stated intention to construct a facility at Cross Plains. The Joint Parties' disavowal of Cross Plains is untimely and, moreover, raises serious questions of legal ethics and abuse. Ironically, the question of service on the Joint Parties turns out to be entirely chimerical since service was made on joint counsel and absolutely no prejudice has been claimed or shown.


WHEREFORE, Wagonwheel Broadcasting of Santa Anna respectfully requests that the Joint Motion to Strike Reply Comments filed by First Broadcasting Management, L.L.C., WBAP/KSCS Operating, Ltd., Blue Bonnet Radio, Inc. and Hunt Broadcasting Inc. be denied.

February 3, 1999

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Respectfully Submitted,

Wagonwheel Broadcasting
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CERTIFICATE OF SERVICE

I, Henry E. Crawford, do hereby certify that copies of the foregoing
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United States mail, postage prepaid this 3rd day of February, 1999 upon the
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